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IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

MID-AMERICA REGIONAL BARGAINING ASSOCIATION, CONTRACTORS ASSOCIATION OF WILL AND GRUNDY COUNTIES, RESIDENTIAL CONSTRUCTION EMPLOYERS COUNCIL, JOLIET CONSTRUCTION CO., and U. S. HOME CORPORATION,

Petitioners,

vs.

WILL COUNTY CARPENTERS DISTRICT COUNCIL, UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA (AFL-CIO), COMMONWEALTH EDISON COMPANY, and GUST K. NEWBERG CONSTRUCTION CO.,

Respondents.

COMMONWEALTH EDISON COMPANY'S BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTIONS PRESENTED*

The Petitioners' statement of the questions presented includes the assertion that the Complaint alleges a broad anticompetitive conspiracy "to drive ... competitors out of business by imposing high wages on them." The Court of Appeals for the Seventh Circuit, in unanimously affirming the District Court's dismissal of the Complaint, expressly found that such a conspiracy was not alleged. (App. A, pp. 10a, 11a, 15a, 16a, 17a.) Therefore, the following questions are presented:

1. Does Section 1 of the Sherman Act reach an arrangement between a union, a contractor, and the contractor's customer which concerns only the wages to be paid to union members for work done on the customer's job site, when no other contract, combination or conspiracy is alleged?

2. Is Section 1 of the Sherman Act violated if—in the absence of an anticompetitive conspiracy involving any business market—a union, a contractor, and the contractor's customer agree that in exchange for labor peace at the customer's job site, the customer will bear the cost of the contractor's paying the amount of a proposed hourly wage increase into an escrow account, from which retroactive wages will, at the conclusion of a labor dispute, be released to union members for work performed on that job site in accordance with whatever wage level is later determined by collective bargaining between the union and a multi-employer bargaining group?

3. Was the Seventh Circuit correct when it followed the lead of the Fourth, Fifth, Sixth, Eighth, and Ninth Circuits in ruling that under this Court's decision in *United Mine Workers* v. *Pennington*, 381 U. S. 657 (1965), before

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* Respondent Commonwealth Edison Company has no subsidiary or affiliated corporations which it does not wholly own.

an agreement concerning only wages can be held to violate the antitrust laws, the parties to the agreement must share an anticompetitive purpose and the alleged non-union conspirators must stand to benefit competitively from the agreement?

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Respondents.

COMMONWEALTH EDISON COMPANY'S BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Respondent Commonwealth Edison Company ("Edison") submits this brief in opposition to the petition for a writ of certiorari to the United States Court of Appeals for the Seventh Circuit filed by Petitioners on July 12, 1982.

OPINIONS BELOW AND JURISDICTION

Edison adopts those portions of the Petition entitled "Opinions Below" and "Jurisdiction" but adds that the opinion of the Court of Appeals entered on April 13, 1982 is reported at 675 F. 2d 881.

STATUTES INVOLVED

Petitioners have failed to identify or set forth those portions of the Clayton Act (15 U. S. C. § 12 *et seq.*), the Norris-LaGuardia Act (29 U. S. C. § 101 *et seq.*), and the National Labor Relations Act (29 U. S. C. § 151 *et seq.*) which the Court of Appeals for the Seventh Circuit reviewed in order to find that the statutory labor exemption to the antitrust laws applies to this case. Accordingly, Edison sets forth the relevant portions of those statutes in the Supplemental Appendix attached hereto.

STATEMENT OF THE CASE

A. *Statement of Facts*

The Petitioners in this case include three trade associations (the "Associations") which have historically enjoyed a monopoly in the business of representing contractors in Will County, Illinois in collective bargaining negotiations. That is, the labor agreements which the Associations have negotiated have typically been adopted by all contractors in the county, including nonmembers of the Associations. (App. C, p. 38a.) Additionally, two contractor members of the Associations (the "Contractors") joined in the Complaint and are Petitioners herein. The Respondents are Will County Carpenters District Council and its international union (the "Unions"), both engaged in the representation of carpenters in collective bargaining; Edison, a public utility providing electric service to northern Illinois; and Gust K. Newberg Construction Co. ("Newberg"), a general contractor which, in 1979, was constructing a nuclear generating station and another power plant for Edison in Will County.

Collective bargaining agreements which the Associations had previously negotiated with the Unions expired on May 31, 1979. After the Associations and the Unions were unable to negotiate a new agreement, the local Union directed its members to engage in selective picketing and strikes against certain contractor members of the Associations. The Associations responded by directing all of their members to defensively "lock out" the Union members. Although Newberg was not a member of any of the Associations, the Edison projects were subject to these strikes and lockouts.

To prevent further expensive work stoppages on its projects, Edison allegedly agreed with the Unions that it would "pressure" Newberg, as well as its other contractors,[1] to pay

[1] Edison's other contractors, who were members of one of the Associations, were not named as defendants although they allegedly participated in the "Escrow Agreement" described above.

into an escrow account $2.25 for each hour worked during the strike by Union members on the Edison projects. (App. C, p. 42a.) Pursuant to this so-called "Escrow Agreement," Edison's contractors were to pay this money into the escrow account for all work done since the expiration of the previous contract on June 1, 1979. At the conclusion of the strike, wages retroactive to that date would be paid to union members out of the escrow account at whatever wage level was ultimately determined through collective bargaining between the Unions and the Associations. Edison agreed to compensate its contractors for this additional expense, and the Unions agreed that their members would continue work on the Edison projects and not strike or picket there.

Approximately, four weeks after the Escrow Agreement was reached, the Associations and the Unions agreed to a $2.25 per hour wage increase retroactive to June 1, 1979.[2]

In the Petition, Petitioners assert, and frequently imply, that the Complaint alleges that the Escrow Agreement was part of a broader conspiracy "to drive [Newberg's] competitors out of business." (Pet. at i (Questions Presented), 12, 13.) However, the Seventh Circuit expressly found that the Complaint, when stripped of its unsupported, conclusory allegations, cannot be fairly read "to allege the existence of a conspiracy apart

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[2] In their Statement of Facts, Petitioners assert that the "Associations were forced to capitulate to the Union's demands." (Pet., p. 5.) Elsewhere in the Petition, they state that Respondents conspired to "impose the terms of the Escrow Agreement on all Will County Carpenters." (Pet., pp. 8-9, 12, 13.) Despite these claims in the Petition, the Seventh Circuit correctly found:

> "There is no allegation in the plaintiffs' complaint that the union adopted a 'take it or leave it' stance in negotiations with the plaintiff contractors. Indeed, the National Labor Relations Board found this was not the case.... Thus, all that can be inferred from the escrow agreement is a promise by the employer to be bound by any wage increase, up to $2.25 per hour, that the union could negotiate with other contractors. Such agreements have never been held violative of the antitrust laws." (App. A, p. 14a.)

from the [escrow] agreement." (App. A, p. 10; *see also* App. A, pp. 4a, 5a.) Indeed, the Court of Appeals found that the factual allegations of the Complaint are inconsistent with the conclusory allegations which Petitioners now assert in the Petition concerning conspiracy and anticompetitive intent.[3] (App. A, p. 17a.) Edison stressed this very point before both the district court and the appellate court; yet, Petitioners never attempted to amend their Complaint. It is too late for them now to claim in their Petition the existence of a broader conspiracy which they were unwilling to assert below. The only question properly before this Court, therefore, is the legality under Section 1 of the Sherman Act of the alleged Escrow Agreement, standing alone.

B. *Nature of the Proceedings*

The Petitioners filed their Complaint on April 15, 1980, alleging that the Respondents had violated Section 1 of the Sherman Act, tortiously interfered with the Associations' contractual relations, and engaged in a civil conspiracy to interfere with the Associations' contractual relations.

On February 11, 1981, the Honorable Frank J. McGarr of the United States District Court for the Northern District of Illinois granted Edison's Motion to Dismiss, finding that the Complaint fails to state a claim upon which relief can be granted under Section 1 of the Sherman Act.[4] On April 13,

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[3] Despite the conclusory statements in the Petition that Respondents conspired to enhance Newberg's competitive position vis-a-vis other contractors, the appellate court found that the Complaint specifically alleges that Newberg "was forced into acting by a non-labor entity [Edison] lacking anticompetitive intent." (App. A., p. 17a.)

[4] Edison moved to dismiss the Complaint on the grounds that it fails to state a claim under Section 1 of the Sherman Act; that because the Sherman Act claim fails, the pendent state law claims should be dismissed under *United Mine Workers* v. *Gibbs*, 383 U. S. 715, 726 (1966); that the Associations have no standing to maintain the action under either Section 4 or 16 of the Clayton Act; that the state law

(Footnote continued on following page.)

1982, the Court of Appeals for the Seventh Circuit unanimously affirmed the District Court's decision.

The Seventh Circuit found three separate grounds for the alleged Escrow Agreement's exemption from antitrust attack. First, the Court of Appeals held that the statutory labor exemption to the antitrust laws applies to this case. Because the only conspiracy alleged is the existence of the Escrow Agreement, the Complaint fails to properly "plead a conspiracy that would remove the alleged agreement from the coverage of the [statutory] labor exemption" to the antitrust laws. (App. A, pp. 7a-14a.) Furthermore, under a separate analysis, the Court found the Complaint fails to meet the specific criteria of *United Mine Workers* v. *Pennington*, 381 U. S. 657 (1965), in which this Court answered the question: under what circumstances might wage agreements become actionable under the antitrust laws? (App. A, pp. 15a-17a.) Finally, the Court of Appeals held that even if Petitioners had properly pleaded a conspiracy between a union and "non-labor entities," the nonstatutory labor exemption to the antitrust laws applies here because the Complaint does not allege a direct restraint upon a business market, but only an indirect restraint that would "follow naturally from the elimination of competition over wages." (App. A, pp. 18a-24a; quoting from *Connell Construction Co.* v. *Plumbers & Steamfitters Local 100*, 421 U. S. 616, 626 (1975).)

REASONS FOR DENYING THE WRIT

The decision below is fully supported by prior cases and creates no clear conflict between the circuits. Moreover, even if the Petitioners were correct that the Seventh Circuit's decision

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(Footnote continued from preceding page.)

claims are pre-empted by federal labor law; that the tortious interference allegations do not state a claim under Illinois common law; and that the civil conspiracy claim is superseded by Illinois statute. The District Court addressed only the first issue when it dismissed the Complaint, and the Seventh Circuit held that dismissal of the pendent state claims was proper under *United Mine Workers* v. *Gibbs*, 383 U. S. 715 (1966). (App. A, p. 4a.)

with respect to one finding or another somehow conflicts with decisions of this Court or of other circuits, the result in this case would not differ, because there were multiple grounds for the appellate court's decision.

Put simply, there is no case which has ever held that an agreement concerning only wages violates any antitrust law, when there is no further allegation of a conspiracy to fix prices, restrict output, or allocate or monopolize markets. Newberg was perfectly free to enter into the Escrow Agreement—or, for that matter, to agree conclusively on an hourly wage—with the Unions, and Edison's agreement to pay the increased cost in order to avoid expensive work stoppages on its construction projects implicates no antitrust considerations. Indeed, the conduct alleged is legally indistinguishable from an allegation that a contractor, working under a "cost plus" arrangement, has entered a wage agreement that other contractors find burdensome. Yet, it would be inconceivable that "cost plus" arrangements would, for that reason, be found to run afoul of the antitrust laws.

The Complaint alleges only that in return for labor peace at a job site, a union, a contractor, and the contractor's customer reached an agreement concerning wages to be paid at that job site. Twenty-seven years ago, Professor Cox wrote, "No one seriously contends that antitrust policy should be concerned with the labor market per se." Cox, *Labor and Antitrust*, 104 U. Pa. L. Rev. 252, 254 (1955). Yet, Petitioners have contended just that, attempting to raise an agreement on wages to the level of an antitrust violation. The time has come to end Petitioners' efforts to turn the clock back on labor and antitrust law,[5] by leaving intact the Seventh Circuit's common sense ruling that a wage agreement, standing alone, is beyond the reach of the antitrust laws.

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[5] In the early part of this century, the antitrust laws were repeatedly used to attack union activities, and Congress legislatively overruled those decisions consistently. *See*, App. A, pp. 5a, 6a.

I.

The Seventh Circuit's Finding That The Escrow Agreement Is Protected By The Statutory Labor Exemption Is Consistent With Prior Decisions By This Court And Other Circuit Courts.

The Seventh Circuit ruled that because the only factual allegation of conspiracy in the Complaint was the existence of the Escrow Agreement—which concerned only the subject of wages—the alleged conduct was protected from antitrust scrutiny by the statutory exemption to the antitrust laws.[6] In holding

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[6] Section 6 of the Clayton Act, 15 U. S. C. § 17, provides in relevant part:

> The labor of a human being is not a commodity or article of commerce. . . .

Section 4 of the Norris-LaGuardia Act, 29 U. S. C. § 104, prohibits any court from issuing:

> any restraining order or temporary or permanent injunction in any case involving or growing out of any labor dispute to prohibit *any person . . . interested in such dispute* (as these terms are herein defined) *from doing, whether singly or in concert,* any of the following acts: . . .
>
> > (c) *Paying or giving to . . . any person, participating or interested in such labor dispute . . . moneys or things of value;*. . . . (emphasis added)

See also, Section 20 of the Clayton Act, 29 U. S. C. § 52. Section 13 of the Norris-LaGuardia Act, 29 U. S. C. § 113, shows that Edison was a person "interested in a labor dispute":

> (b) *A person . . . shall be held to be a person participating or interested in a labor dispute if . . . he . . . has a direct or indirect interest therein. . . .*
>
> (c) The term "labor dispute" includes any controversy concerning terms or conditions or employment, . . . *regardless of whether or not the disputants stand in the proximate relation of employer and employee.* (emphasis added)

See, New Negro Alliance v. *Sanitary Grocery Co.,* 303 U. S. 552 (1938) (civic organization was "person interested in labor dispute" concerning defendant's personnel policies toward black employees). *See generally,* Supplemental Appendix attached hereto.

that an agreement concerning only wages falls within the statutory labor exemption to the antitrust laws, the Seventh Circuit was consistent with prior cases from this Court and other circuits.

Petitioners claim that the decision below conflicts with prior decisions in two respects. First, they claim that only the Unions, and not Edison or Newberg, can assert the statutory exemption. The Seventh Circuit's common sense answer to this claim shows that no such conflict exists.[7]

> "Although both the statutory and the non-statutory exemptions are generally phrased as exemptions for union behavior, logic dictates that they be applied to all parties when an agreement with a union forms the basis of a complaint. The exemption would serve little purpose in furthering national labor policy if employers risked liability under the antitrust laws for entering into collective bargaining agreements. Other circuits have concurred in this judgment.... *Scooper Dooper, Inc.* v. *Kraftco Corp.*, 494 F.2d. 840, 847 n. 14 (3d Cir. 1974). *See also, Amalgamated Meat Cutters & Butchers Local 576* v. *Wetterau Foods, Inc.*, 597 F. 2d 133, 136 (8th Cir. 1974); *Mackey* v. *NFL*, 543 F. 2d 606, 612 (8th Cir. 1976), *cert. dismissed*, 434 U. S. 801 (1977)."

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[7] In order to create the illusion of a conflict between the circuits, Petitioners cite to a footnote in *Snyder Co.* v. *Associated General Contractors*, 677 F. 2d 1111, 1118, n.10 (6th Cir. 1982), a case brought by employers against employers. However, the Sixth Circuit's *Snyder* footnote, which briefly discusses the statutory and nonstatutory labor exemptions, is mere dicta, since the court did not even analyze the case in terms of those exemptions, but instead compared the facts with *United Mine Workers* v. *Pennington*, 381 U. S. 657 (1965), in which this Court "addressed allegations substantially the same as those made by plaintiffs in the present case [*Snyder*]." 677 F. 2d at 1118. Of course, the Seventh Circuit here also used "*Pennington* as a distinct mode of analysis," and found that even under that analysis, the Complaint fails to state a cause of action. (App. A, p. 15a.)

(App. A, pp. 17a, 18a.) *See also, Connell Construction Co.* v. *Plumbers & Steamfitters Local 100,* 421 U. S. 616, 622 (1975).[8]

Petitioners argue further that the decision below conflicts with prior decisions because it affords a statutory exemption to the Escrow Agreement, which by definition is an agreement among a union and non-unions. Any such agreement, say the Petitioners, is a "combination of labor and non-labor entities" which is not entitled to protection from antitrust scrutiny. Petitioners apparently propose to argue before this Court, as they did below, that union activity that falls within the language of the exempting statutes, and that attempts to influence the conduct of others, is protected only so long as that conduct is unsuccessful. That is, under the Petitioners' view of labor law, once the non-union party agrees to act in accordance with the union's desires, the statutory exemption would be forfeited—and the union would be vulnerable to antitrust attack.

It is the Petitioners' position, and not the decision below, which has no support in prior decisions. The decisions of this Court are clear that an illegal "combination of labor and non-labor entities" occurs, and the statutory labor exemption is forfeited, only when union activity is undertaken to aid and abet an anticompetitive conspiracy of business interests. *Local No. 189, Amalgamated Meat Cutters* v. *Jewel Tea Co.,* 381 U. S. 676 (1965); *United Mine Workers* v. *Pennington,* 381 U. S. 657 (1965); *Allen Bradley Co.* v. *Local 3, IBEW,* 325 U. S. 797, *reh. denied,* 326 U. S. 803 (1945); *Hunt* v. *Crumboch,* 325 U. S. 821 (1945); *United States* v. *Hutcheson,* 312 U. S. 219 (1941); *Apex Hosiery* v. *Leader,* 310 U. S. 469 (1940); *United States* v. *Brims,* 272 U. S. 549 (1926). Here, the Court of Appeals expressly found that no such conspiracy was alleged.

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[8] Conduct protected from injunction pursuant to Section 4 of the Norris-LaGuardia Act is also exempt "from the operation of the antitrust laws," *Connell Construction Co.* v. *Plumbers & Steamfitters Local 100,* 421 U. S. 616, 622 (1975), and cannot lay the basis for a damage claim under Section 4 of the Clayton Act, 15 U. S. C. § 15.

The Seventh Circuit also found that the allegations of the Complaint fail to meet the requirements of *United Mine Workers* v. *Pennington*, 381 U. S. 657 (1965), which addressed the issue: in what circumstances might a wage agreement become a vehicle or guise for commercial restraints and therefore unworthy of the statutory exemption? The appellate court's decision is perfectly consistent with *Pennington* and other decisions of this Court and other circuits in holding that before a wage agreement can be held to violate the antitrust laws, the parties to the agreement must share an anticompetitive purpose and the alleged non-union conspirators must stand to benefit competitively from the agreement. *See, Smitty Baker Coal Co.* v. *United Mine Workers*, 620 F. 2d 416, 432 (4th Cir.), *cert. denied*, 449 U. S. 870 (1980); *Embry-Riddle Aeronautical University* v. *Ross Aviation, Inc.*, 504 F. 2d 896, 903 (5th Cir. 1974); *Bodine Produce, Inc.* v. *United Farm Workers Organizing Committee*, 494 F. 2d 541, 560-61 (9th Cir. 1974); *Amalgamated Meat Cutters* v. *Wetterau Foods, Inc.*, 597 F. 2d 133, 136 (8th Cir. 1974); *Ramsey* v. *United Mine Workers*, 481 F. 2d 742 (6th Cir.), *cert. denied*, 414 U. S. 1067 (1973). Applying those accepted standards, the court below found that when it is alleged that a union seeking higher wages and a utility seeking to have work continue on its expensive construction projects, agree that the utility will "pressure" its contractor—the only party who could conceivably reap any anticompetitive benefit—into signing an "escrow agreement," those allegations are "inadequate to fall with the *Pennington* model." (App. A, p. 17a.)

Petitioners totally distort the appellate court's opinion when they argue: "However, it cannot be seriously contended that [Edison's] participation immunizes an agreement which otherwise would be unlawful." (Pet., p. 12.) The Seventh Circuit specifically found that the Complaint's factual allegations negate any possible inference of anticompetitive intent by Newberg; therefore, no *Pennington* claim can be made out

against Newberg. *See, Snyder Co.* v. *Associated General Contractors,* 677 F. 2d 1111 (6th Cir. 1982); *Smitty Baker Coal Co.* v. *United Mine Workers,* 620 F. 2d 416, 432-33 (4th Cir.), *cert. denied,* 449 U. S. 870 (1980). Newberg was perfectly free to enter the Escrow Agreement, or any wage agreement, with the Unions, and the fact is that it cannot be seriously contended that a wage agreement between a contractor and a union becomes an antitrust violation merely because the contractor's customer, a utility with no possible anticompetitive interest, agrees to pay some or all of the incremental cost of the new wages.

II.

The Court Below Correctly Applied The Nonstatutory Labor Exemption To This Case.

The nonstatutory labor exemption represents a judicial recognition that certain labor-related activities, which are not expressly provided for by statute, must be immune from antitrust attack if national labor policy is not to be thwarted by the application of the antitrust laws. The Seventh Circuit held that the alleged Escrow Agreement, because it concerned only the labor market and imposed no restraint on a commercial or business market, implicated no serious antitrust concerns and was therefore deserving of the nonstatutory labor exemption.

Petitioners hope to avoid this common sense result by claiming that the decision below conflicts with other decisions because it applies the nonstatutory exemption although Edison is not the employer of the Unions' members. To support this assertion, Petitioners point to *Connell Construction Co.* v. *Plumbers & Steamfitters Local 100,* 421 U. S. 616 (1975), and its progeny.[9] But, in the *Connell*-type cases, plaintiffs have alleged that the union-employer agreement imposed a direct

[9] In *Connell,* a local union forced the plaintiff general contractor, which did not employ the union's members, to agree to stop employing subcontractors which were not parties to the union's current collective bargaining agreement; *i.e.,* the union imposed a direct restraint in the subcontracting commercial market.

restraint on a commercial or business market. *Id.* at 622-626; *California State Council of Carpenters* v. *Associated General Contractors of California, Inc.*, 648 F. 2d 527 (9th Cir. 1980), *cert. granted*, 102 S. Ct. 998 (1982); *Larry V. Muko, Inc.* v. *Southwestern Pennsylvania Trades Council*, 609 F. 2d 1368 (3d Cir. 1978); *James Julian Inc.* v. *Raytheon Co.*, 499 F. Supp. 949 (D. Del. 1980); *National Constructors Association* v. *National Constructors Association* v. *National Electrical Contractors Association, Inc.*, 498 F. Supp. 510 (D. Md. 1980), *aff'd*, 678 F. 2d 487 (4th Cir. 1982); *Altemose Construction Co.* v. *Atlantic, Cape May, etc. Building Trades Council*, 493 F. Supp. 1181 (D. N. J. 1980). It is only then—when the alleged restraint "would not follow naturally from the elimination of competition over wages"—that the nonstatutory labor exemption requires balancing of labor and antitrust concerns. *Connell*, 421 U. S. at 626. *See, Consolidated Express, Inc.* v. *New York Shipping Ass'n*, 602 F. 2d 494, 513 (3d Cir. 1979), *vacated on other grounds*, 448 U. S. 901 (1980); *Granddad Bread, Inc.* v. *Continental Baking Co.*, 612 F. 2d 1105, 1110 (9th Cir. 1979), *cert. denied*, 449 U. S. 1076 (1981). When, as here, plaintiffs allege only an agreement concerning the price to be paid for human labor, all that is alleged is an agreement "the anticompetitive effects of which are consistent with national labor policy." (Pet., pp. 8, 10).

Petitioners' argument that labor policy has been violated here is nothing more than a thinly-veiled attempt by the Associations to maintain their historic monopoly over collective bargaining in Will County.[10] They argue:

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[10] Petitioners argue that the decision below creates a conflict because there was no "*bona fide* collective bargaining agreement" between Edison and the Unions. But, Petitioners have never pointed to any case in which the nonstatutory exemption was denied to a pure wage agreement on that basis. Indeed, the foundation of Petitioners' semantic argument was exposed below to be a series of "sham union" or "sham collective bargaining agreement" cases in which employers established and dominated sham unions and entered sham collective bargaining agreements in order to impose restraints on product

(Footnote continued on following page.)

> "[T]he Associations could not exert any countervailing economic pressure on [Edison] since it was outside of the collective bargaining relationship between the Union and the Associations. . . . Thus, the level of carpentry wages was not established through the 'give and take' of collective bargaining where the respective economic strengths of union and employer determine the outcome." (Pet., p. 10.)

Yet, Newberg certainly had every right to settle the labor dispute with the Unions on whatever terms it wished. Petitioners could not have "exerted countervailing economic pressure" against Newberg in that case. The fact that Newberg desired to please its customer and the fact that its customer was willing to pay an allegedly high price to avoid the costs associated with delay to its construction resulted in exactly what Petitioners now claim they seek—an outcome determined by "the respective economic strengths of union and employer."

The Complaint alleges no activity which violates any labor policies. Petitioners complain simply that during a labor dispute, the Unions successfully pressured those businesses which had a great amount to lose from work stoppages into agreeing to wage demands to which Petitioners would have chosen not to agree. But neither the Unions' vigorous pursuit of higher wages nor Edison's or Newberg's acquiescence violates labor policy. "The Union need not gear its wage demands to

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(Footnote continued from preceding page.)

markets. These restraints were held not exempt from antitrust attack. *Tugboat, Inc.* v. *Mobile Towing Co.*, 534 F. 2d 1172 (5th Cir. 1976); *Carpenters District Council* v. *United Contractors Ass'n*, 484 F. 2d 119 (1973), *modified on other grounds*, 539 F. 2d 1092 (5th Cir. 1976); *International Ass'n of Heat & Frost Insulators* v. *United Contractors*, 483 F. 2d 384 (3rd Cir. 1973). *See also, Los Angeles Meat & Provision Drivers Union* v. *U. S.*, 371 U. S. 98 (1962); *Columbia River Packers Ass'n* v. *Hinton*, 315 U. S. 143 (1942). These cases are irrelevant to the instant case, in which Petitioners simply contend that any agreement not negotiated by the Associations is not a *"bona fide"* agreement. Similar claims have been rejected. *See, Amalgamated Meat Cutters* v. *Wetterau Foods*, 597 F. 2d 133 (8th Cir. 1979).

wages which the weakest unit in the industry can afford to pay." *United Mine Workers* v. *Pennington*, 381 U. S. at 657, n. 2. Moreover, a union has no duty to reach wage agreements with all units in an industry simultaneously, and an employer and its customer have no duty to suffer the ravages of economic warfare with a union until such time as all employers in the industry are able to enjoy industrial peace.

The direct restraint alleged does not involve a business or product market; the activities alleged do not contravene labor policy; and the effects of the Escrow Agreement of which Petitioners complain "follow naturally from the elimination of wage competition." *Connell*, 421 U. S. at 626. Accordingly, the nonstatutory exemption was correctly applied and no novel issue of national labor policy is presented by this case.

CONCLUSION

For the above reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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SUPPLEMENTAL APPENDIX

SUPPLEMENTAL APPENDIX OF RELEVANT STATUTORY AUTHORITY

Section 6 of the Clayton Act, 15 U.S.C. § 17, provides:

> The labor of a human being is not a commodity or article of commerce. Nothing contained in the antitrust laws shall be construed to forbid the existence and operation of labor, agricultural, or horticultural organizations, instituted for the purposes of mutual help, and not having capital stock or conducted for profit, or to forbid or restrain individual members of such organizations from lawfully carrying out the legimate objects thereof; nor shall such organizations, or the members thereof, be held or construed to be illegal combinations or conspiracies in restraint of trade, under the antitrust laws.

Section 20 of the Clayton Act, 29 U.S.C. § 52, provides:

> No restraining order or injunction shall be granted by any court of the United States, or a judge or the judges thereof, in any case between an employer and employees, or between employers and employees, or between employees, or between persons employed and persons seeking employment, involving, or growing out of, a dispute concerning terms or conditions of employment, unless necessary to prevent irreparable injury to property, or to a property right, of the party making the application, for which injury there is no adequate remedy at law, and such property or property right must be described with particularity in the application, which must be in writing and sworn to by the applicant or by his agent or attorney.
>
> And no such restraining order or injunction shall prohibit any person or persons, whether singly or in concert, from terminating any relation of employment, or from ceasing to perform any work or labor, or from recommending advising, or persuading others by peaceful means so to do; or from attending at any place where any such person or persons may lawfully be, for the purpose of peacefully obtaining or communicating information, or from peacefully persuading any person to work or to

abstain from working or from ceasing to patronize or to employ any party to such dispute, or from recommending, advising or persuading others by peaceful and lawful means so to do; or from paying or giving to, or withholding from, any persons engaged in such dispute, any strike benefits or other moneys or things of value; or from peaceably assembling in a lawful manner, and for lawful purposes; or from doing any act or thing which might lawfully be done in the absence of such dispute by any party thereto; nor shall any of the acts specified in this paragraph be considered or held to be violations of any law of the United States.

Section 2 of the Norris-LaGuardia Act, 29 U.S.C. § 104, provides:

In the interpretation of this chapter and in determining the jurisdiction and authority of the courts of the United States, as such jurisdiction and authority are defined and limited in this chapter, the public policy of the United States is declared as follows:

Whereas under prevailing economic conditions, developed with the aid of governmental authority for owners of property to organize in the corporate and other forms of ownership association, the individual unorganized worker is commonly helpless to exercise actual liberty of contract and to protect his freedom of labor, and thereby to obtain acceptable terms and conditions of employment, wherefore, though he should be free to decline to associate with his fellows, it is necessary that he have full freedom of association, self-organization, and designation of representatives of his own choosing, to negotiate the terms and conditions of his employment, and that he shall be free from the interference, restraint, or coercion of employers of labor, or their agents, in the designation of such representatives or in self-organization or in other concerted activities for the purpose of collective bargaining or other mutual aid or protection; therefore, the following definitions of and limitations upon the jurisdiction and authority of the courts of the United States are enacted.

Section 4 of the Norris-LaGuardia Act, 29 U.S.C. § 104, provides in relevant part:

> No court of the United States shall have jurisdiction to issue any restraining order or temporary or permanent injunction in any case involving or growing out of any labor dispute to prohibit any person or persons participating or interested in such dispute (as these terms are herein defined) from doing, whether singly or in concert, any of the following acts: . . .
>
> (c) Paying or giving to, or withholding from, any person participating or interested in such labor dispute, any strike or unemployment benefits or insurance, or other moneys or things of value; . . . .

Section 5 of the Norris-LaGuardia Act, 29 U.S.C. § 105, provides:

> No court of the United States shall have jurisdiction to issue a restraining order or temporary or permanent injunction upon the ground that any of the persons participating or interested in a labor dispute constitute or are engaged in an unlawful combination or conspiracy because of the doing in concert of the acts enumerated in section 104 of this title.

Section 13 of the Norris-LaGuardia Act, 29 U.S.C. § 113, provides in relevant part:

> When used in this chapter, and for the purposes of this chapter:
>
> (a) A case shall be held to involve or to grow out of a labor dispute when the case involves persons who are engaged in the same industry, trade, craft, or occupation; or have direct or indirect interests therein; or who are employees of the same employer; or who are members of the same or an affiliated organization of employers or employees; whether such dispute is (1) between one or more employers or associations of employers and one or more employees or associations of employees; (2) between one or more employers or associations of employers and

one or more employers or associations of employers; or (3) between one or more employees of associations of employees and one or more employees or associations of employees; or when the case involves any conflicting or competing interests in a "labor dispute" (as defined in this section) of "persons participating or interested" therein (as defined in this section).

(b) A person or association shall be held to be a person participating or interested in a labor dispute if relief is sought against him or it, and if he or it is engaged in the same industry, trade, craft or occupation in which such dispute occurs, or has a direct or indirect interest therein, or is a member, officer or agent of any association composed in whole or in part of employers or employees engaged in such industry, trade, craft or occupation.

(c) The term "labor dispute" includes any controversy concerning terms or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions or employment, regardless of whether or not the disputants stand in the proximate relation of employer and employee. . . .

Section 1 of the National Labor Relations Act, 29 U.S.C. § 151, provides:

The denial by some employers of the right of employees to organize and the refusal by some employers to accept the procedure of collective bargaining lead to strikes and other forms of industrial strife or unrest, which have the intent or the necessary effect of burdening or obstructing commerce by (a) impairing the efficiency, safety, or operation of the instrumentalities of commerce; (b) occurring in the current of commerce; (c) materially affecting, restraining, or controlling the flow of raw materials or manufactured or processed goods from or into the channels of commerce, or the prices of such materials or goods in commerce; or (d) causing diminution of employment and wages in such volume as substantially to impair or disrupt the market for goods flowing from or into the channels of commerce.

The inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract, and employers who are organized in the corporate or other forms of ownership association substantially burdens and affects the flow of commerce, and tends to aggravate recurrent business depressions, by depressing wage rates and the purchasing power of wage earners in industry and by preventing the stabilization of competitive wage rates and working conditions within and between industries.

Experience has proved that protection by law of the right of employees to organize and bargain collectively safeguards commerce from injury, impairment, or interruption, and promotes the flow of commerce by removing certain recognized sources of industrial strife and unrest, by encouraging practices fundamental to the friendly adjustment of industrial disputes arising out of differences as to wages, hours, or other working conditions, and by restoring equality of bargaining power between employers and employees.

Experience has further demonstrated that certain practices by some labor organizations, their officers, and members have the intent or the necessary effect of burdening or obstructing commerce by preventing the free flow of goods in such commerce through strikes and other forms of industrial unrest or through concerted activities which impair the interest of the public in the free flow of such commerce. The elimination of such practices is a necessary condition to the assurance of the rights herein guaranteed.

It is declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise of workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.